The Attorney General of Texas

April 22, 1980

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Honorable William P. Clements, Jr.
Governor of Texas
State Capitol
Austin, Texas 78711

Open Records Decision No. 241

Re: Whether information gathered by the Governor regarding potential nominees for public office is subject to the Open Records Act.

Dear Governor Clements:

You request the decision of this office pursuant to section 7 of article 6252-17a, V.T.C.S., the Texas Open Records Act. You have received two requests for information concerning recommendations for appointment to office. One request asks for "copies of all correspondence, telegrams, telephone memorandum, etc., that pertains to recommendations to fill expected vacancies on the Supreme Court of Texas." The other request seeks "memos of telephone calls in which persons were recommended for the upcoming vacancy [on the Public Utilities Commission] as well as any other records of communications with regard to prospective nominees."

You contend that the information requested is excepted from required public disclosure under sections 3(a)(1) or 3(a)(9) of the Act which except:

> (1) information deemed confidential by law, either Constitutional, statutory, or by judicial decision;
>
> . . . .
>
> (9) private correspondence and communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy.

This office considered the issues posed by you in Open Records Decision No. 212 (1978), and concluded that the fact that the governor has received letters making recommendations for appointment is not per se excepted from required public disclosure under either of the exceptions cited by you. That decision reviewed the cases concerning the constitutional right of privacy and said:

> Thus, we conclude that no constitutional right of privacy has been recognized which would prohibit disclosure of the fact that a person recommended another or himself to the governor for appointment.

That decision went on to consider the standards for determining whether a common-law right of privacy exists in information, as set out by the Texas Supreme Court in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976). This office concluded:

> We do not believe the fact that a person has recommended another or himself for appointment by the governor meets the test of disclosing 'highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person.' The content of a particular letter might disclose highly intimate or embarrassing facts, but we do not think that the fact of a favorable recommendation can be considered per se an invasion of the privacy of either the person recommended or the person making the recommendation.

Open Records Decision No. 212, at 4 (1978). At least insofar as the person making the recommendation is concerned, the chance that an invasion of privacy might exist is substantially diminished, since no recommendation submitted after the issuance of Open Records Decision No. 212 (1978) could have been made in the expectation that it would be private.

The second part of the test for determining whether information is protected by the common-law tort right of privacy is that the information is not of legitimate concern to the public. Your position in asserting the applicability of the exceptions contained in sections 3(a)(1) and 3(a)(9) appears to be that the public has no legitimate concern with the appointment process until a nomination is made and submitted to the Senate for confirmation. You contend:

> Until a final selection of a nominee has been made by the Governor and the name of the appointee is subject to Senate action, no element of public information is involved.

We cannot agree with the position that the public has no legitimate interest in knowing who has been recommended by whom for appointment to state offices prior to the time a decision is made by the governor. In Open Records Decision No. 188 (1978), this office said in reference to persons under consideration for appointment as municipal judge:

> We believe the qualifications of appointed judges are an appropriate topic for public debate. Accordingly we do not believe that disclosure of the document revealing the names of individuals who are seeking appointment to judicial positions can be said to constitute a clearly unwarranted invasion of personal privacy.

The legislature has met in regular session since Open Records Decision Nos. 212 (1978) and 188 (1978) were made, and no change was made in the law on which those decisions were based. In light of this legislative acquiescence, and absent any subsequent judicial decisions expanding the scope of the constitutional or common law right of privacy in information of the type requested, we have no basis on which to overrule those prior decisions.

The requests for information in this case go beyond the information dealt with in Open Records Decision Nos. 212 (1978) and 188 (1978). The information in those decisions was limited to identifying persons making recommendations, those who had been recommended, and those who had applied for an appointive office.

In Open Records Decision No. 212 (1978) this office recognized that the content of some communications might disclose highly intimate or embarrassing facts so as to raise the issue of whether that information might be excepted from public disclosure under the privacy concept under sections 3(a)(1) or 3(a)(9). That decision advised then-Governor Briscoe:

> If you believe that a particular letter falls within an exception, the information should be submitted to the Attorney General in accordance with section 7 of the Act, for an in camera inspection and determination of whether and to what extent the information may be withheld.

You have submitted two types of documents concerning appointments as "examples of the type of communications requested by the media." While we discuss this question in terms of these examples, our opinion is necessarily limited to the documents submitted to us.

One example of the first type is a memorandum to the file listing names of persons recommended for appointment to particular positions by other persons. Another is a letter from a person submitting an application and listing a number of appointive positions the person would accept. Two others are letters from persons applying for appointment to particular positions. One letter simply urges the appointment to the Public Utility Commission of someone who will represent the public, without submitting any name.

You have not called our attention to any information in any of this correspondence which you regard as containing "highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person." We have reviewed it and do not find any basis for so characterizing any of the material submitted. Neither have you shown that disclosure of any of this information would result in the type of specific physical or economic harm which the United States Supreme Court has required to support a claim of infringement of First Amendment associational rights. See Open Records Decision No. 212, at 3 (1978). It is our decision that none of the documents you have submitted containing this type information are excepted from required public disclosure under either section 3(a)(1) or 3(a)(9).

The second type of information you have submitted includes correspondence and memorandums of conversations about prospective appointees. All of the examples you have submitted include information which is highly derogatory to the individual who is the subject of the communication. Most appears to have been developed in the process of conducting informal background checks. The examples you have submitted include information on financial difficulties, personality evaluations, suggestions of mental illness, questions about an individual's honesty and integrity, and evaluations of a person's professional ability. We believe that information of this type would constitute "highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person." Thus, a privacy interest under the test set out by the Texas Supreme Court can be established. The remaining portion of that test is whether the public has a legitimate interest in the material. While under some circumstances or at some stage in the process a public interest in these documents might be established, we do not believe that the public can be said to have a legitimate interest in this sort of highly derogatory, largely unverified information at such an early and speculative stage in the appointment process. See, e.g., Open Records Decision No. 159 (1977). Under other circumstances or at another stage in the appointment process, it may be possible that a legitimate public interest could be established sufficient to overcome the first half of the section 3(a)(1) test. In this case that interest has not been established. Accordingly, we do not believe that the documents you have submitted containing information of the second type need be revealed.

In summary, records maintained by the Governor which reveal recommendations of persons for appointment to public office are not per se excepted from public disclosure. The documents you have submitted containing derogatory, largely unverified information contained in informal background checks of prospective appointees are not required to be revealed. Whether any particular document is required to be released will be determined in light of the test established by the Texas Supreme Court in Industrial Foundation of the South, supra, i.e., whether the information discloses highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and in which the public has no legitimate interest.

Very truly yours,

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